Office-Supreme Court, U.S.
FILED
NOV 27 1967
JOHN F. DAVIS, CLERK

Nos. 778 & 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

NORFOLK & WESTERN RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of New York

---

MOTION TO AFFIRM

WILLIAM G. MAHONEY
WILLIAM J. HICKEY
620 Tower Building
Washington, D. C. 20005

Attorneys for Railway Labor Executives' Association, Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778 & 779

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

NORFOLK & WESTERN RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of New York

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the Railway Labor Executives' Association (Association) moves that the judgment of the District Court be affirmed insofar as it sustains orders of the

Interstate Commerce Commission (Commission) imposing *inter alia* protective conditions for the benefit of the employees of Erie-Lackawanna Railroad Company (EL), The Delaware and Hudson Railroad Corporation (D&H), and Boston and Maine Corporation (B&M).

STATEMENT

These are direct appeals from the final judgment of a three-judge district court dismissing complaints of appellants which sought to set aside orders of the Commission requiring the inclusion, subject to specified conditions, of the EL, D&H, and B&M into the Norfolk and Western Railway Company (N&W) system.

Among the conditions imposed upon the N&W by the Commission was a requirement that employees of the included railroads (EL, D&H and B&M) be granted protection in their employment identical to that granted employees of the N&W, the New York, Chicago & St. Louis Railway Company (Nickel Plate) and the Wabash Railroad Company (Wabash) in consummation of the merger of the Nickel Plate into the N&W and the lease of the Wabash by the N&W. In addition, the Commission imposed an "employee freeze" for the benefit of the employees of the included railroads for a 60-day period following the effective date of its order to allow the N&W and the representatives of the employees of the included railroads to negotiate and execute agreements to provide for employment protection.

On this appeal, as in the court below, the interests of the Association are limited to the issue of the conditions imposed for the protection of the employees of

the EL, D&H and B&M. An issue as to the lawfulness of such conditions is presented as Question No. 6 at page 3 of the Jurisdictional Statement filed with this Court by the N&W.

The court below, at pages 32 and 33 of its pamphlet opinion, which is attached as Appendix B to the Jurisdictional Statement of the N&W, held that the "Commission acted within its power in requiring N&W to protect employees of the three roads as thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed." The court further held that the Commission did not abuse its discretion in imposing the 60-day "employee freeze" because the N&W "would scarcely be making work reassignments in this brief interval, and we see no basis for its fear that the freeze would continue during possible litigation of a Commission decision allowing work reassignments."

In the body of its Jurisdictional Statement filed herein, the N&W does not address itself to the alleged error of the District Court in sustaining the employee protective conditions imposed by the Commission. The phraseology of its Question No. 6, however, indicates that the N&W believes that the Commission departed "from established administrative precedent in . . . fixing labor conditions"; that "the Commission did not justify its action with rational findings"; and, that the District Court erred in sustaining the Commission's action in this matter.

ARGUMENT

The decision of the District Court is plainly correct as concerns the imposition by the Commission of employee protective conditions. Section 5(2)(f) of the

Interstate Commerce Act [49 U.S.C., § 5(2)(f)] requires the Commission to effect "a fair and equitable arrangement to protect the interests of railroad employees affected" by orders issued under the provisions of that section. Section 5(2)(c)(2) [49 U.S.C., § 5(2)(c)(2)] requires the Commission to give weight to "the effect upon the public interest of the inclusion . . . [of] other railroads in the territory involved in the proposed transaction."

Appendix O to the Commission's report and order approving the absorption of the Nickel Plate and Wabash by the N&W specifically provided that the Commission would retain jurisdiction to direct the inclusion into the N&W system of the EL, D&H and B&M if "found consistent with the public interest . . . under such terms as may be found equitable to all parties involved" (324 I.C.C. at 148; see also N&W Jurisdictional Statement at pages 4 and 5). In accepting authority to take over the Nickel Plate and the Wabash, the N&W accepted the provisions of Appendix O.

The Commission found that on the basis of the evidence of record "the imposition of the so-called attrition conditions will not impose a significant burden on any of the carriers involved" (330 I.C.C. at 824). The Commission further found "that N&W has voluntarily consented to that arrangement for its present employees and we see no reason for exempting similarly situated employees of petitioners [EL, D&H, B&M]" (330 I.C.C. at 824).

The courts, quite properly, have declined to substitute their judgment for the judgment of the Commission based upon the evidence presented to the Commis-

sion. *Chicago, St. Paul, Milwaukee & Omaha R. Co. v. U. S.*, 322 U.S. 1, 2-3 (1944). In the instant case the Commission's findings clearly disclosed that they were based upon sufficient evidence; do not depart from, but follow, established administrative precedent; and, indeed, were supported by the Commission's laudable desire to insure that employees of the included railroads would not be discriminated against in terms of employment protection which they would be afforded as employees in the N&W system.

As the District Court found, the Commission neither abused its discretion nor exceeded the limits of its delegated authority in providing for the protection of the employees of the included railroads.

CONCLUSION

It is respectfully submitted that the appellants present no substantial question for the decision of this Court as concerns the employment protection granted employees of the EL, D&H and B&M, and the judgment of the District Court should be affirmed.

WILLIAM G. MAHONEY
WILLIAM J. HICKEY
620 Tower Building
Washington, D. C. 20005

Attorneys for Railway Labor Executives' Association

Office-Supreme Court, U.S.
FILED
NOV 27 1967
JOHN F. DAVIS, CLERK

Nos. 778 and 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

---

MOTION OF BOSTON AND MAINE CORPORATION TO AFFIRM

EDWARD A. McDERMOTT
JAMES A. BELSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorneys for Boston
and Maine Corporation
Appellee in Nos. 778 and 779

Of Counsel:

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

November 27, 1967

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	3
THE PENN-CENTRAL MERGER CASE	4
N&W INCLUSION CASE	8
B&M'S FUTURE	10
CONCLUSION	13

TABLE OF CASES

Baltimore & Ohio Ry. Co. v. United States, 386 U.S. 372 (1967)	2
Norfolk and Western Railway Co. and New York, Chicago and St. Louis Railroad Co.—Merger, Etc., 330 I.C.C. 780 (1967)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee Boston and Maine Corporation[1] (B&M) moves that the final judgment and order of the district court with respect to the *Penn-Central* merger proceedings, No. 778, October Term, 1967, be affirmed, and that the final judgment of the district court in the *N&W Inclusion* case, No. 779, October Term, 1967, be affirmed in part, that is, with respect to

---

[1] B&M is an appellee in No. 778, the Penn-Central merger case, and in No. 779, the N&W Inclusion case, insofar as the arguments of N&W are concerned. B&M, in No. 833, appeals in part from the judgment below in the N&W Inclusion case.

the challenges thereto asserted by Norfolk and Western Railway Company (N&W), on the grounds that the questions raised in both appeals are insubstantial.

STATEMENT

The action to enjoin consummation of the merger between the Pennsylvania and New York Central railroads is before this Court for the second time. Since the opinion of this Court of March 27, 1967,[2] the Commission has issued a final order in the *N&W Inclusion* proceedings, has restored the provisions calling for indemnification of the three protected lines until their inclusion in a major system,[3] has strengthened the conditions designed to protect their traffic, and has found that no capital indemnification is necessary because no loss of capital value will occur to the protected lines as a result of the Penn-Central merger.

B&M did not participate in the prior review of the Penn-Central proceedings in this Court because it had concluded that its eventual inclusion in a merged system would be speeded and assisted by early consummation of the Penn-Central merger, and therefore took no part in efforts to delay the merger further. B&M adheres to that view. See the affidavit of its chief executive officer, Richard J. Mulhern, filed in the district court on September 12, 1967, App. A hereto, p. A-2, and discussed *infra*.

The *N&W Inclusion* case is before this Court for the first time. B&M moves to affirm the judgment and order

---

[2] *Baltimore & Ohio Ry. Co.* v. *United States*, 386 U.S. 372 (1967).

[3] It would appear fair to characterize as the principal grounds for this Court's earlier reversal the Commission's withdrawal of the indemnity provisions which it had earlier found to be a necessary part of the protection to be accorded E-L, D&H and B&M against the effects of the Penn-Central merger pending their inclusion in a merged system.

of the court below only insofar as N&W's challenges to that order are concerned. B&M has instituted its own appeal, No. 833, October Term, 1967, seeking reversal in part and remand to the Commission for further hearings and consideration of the terms for B&M's inclusion in N&W, particularly with respect to the amount of savings (and traffic gains) which would be realized under the type of control which the Commission found N&W will exercise over B&M as a subsidiary. Therefore, B&M seeks only partial affirmance of the district court's judgment in the N&W inclusion case. The history of that proceeding is reviewed in B&M's Jurisdictional Statement in No. 833 and in B&M's brief filed with the district court.

ARGUMENT

All of N&W's [4] contentions in both appeals must be analyzed in the light of its goal to realize its proposed merger with C&O-B&O prior to or contemporaneous with the consummation of the Penn-Central merger and prior to (or instead of) the inclusion of B&M, D&H or E-L, in the N&W system. The Commission, after noting that it has been engaged continuously for almost seven years in these related merger transactions, commented with respect to N&W's opposition to Penn-Central: [5] "it is lodged primarily as tactical support of the proposed N&W-C&O merger. . . ." The substantiality of questions raised in N&W's appeals must be viewed and examined in the light of the public interest. While the responsible administrative agency has made

---

[4] The arguments advanced in the jurisdictional statements in Nos. 778 and 779 will be referred to herein as N&W's arguments. Baltimore and Ohio, Chesapeake and Ohio, and Western Maryland are also parties appellant in No. 778.

[5] Norfolk and Western Railway Co. and New York, Chicago and St. Louis Railroad Co.—Merger, Etc., 330 I.C.C. 780, 785-86 (1967).

affirmative findings concerning the public interest aspects of the merger of Penn and Central and of the inclusion of the three petitioning carriers in the N&W system, it has not done so with regard to the N&W-C&O merger. N&W's effort to make every other public and private interest in these proceedings subordinate to its consuming interest in its next merger lacks the strength that such a finding would give it.

THE PENN-CENTRAL MERGER CASE

In its Jurisdictional Statement in the *Penn-Central* case, No. 778, N&W's first "substantial" point is an assertion that D&H may not, and B&M assuredly will not, accept the Commission's determination as to terms of inclusion and, therefore, the Commission and district court have both erred in permitting the Penn-Central merger to be consummated before it has been finally determined in what system E-L, D&H and B&M will be placed.

N&W expressly premises that argument, and each other argument which it raises on this appeal, on the fact that "B&M will remain outside of any major system even though the Commission has found that it will thereby be threatened with destruction."[6] That premise is without foundation in fact and is erroneous for it ignores the fact that the Commission has reimposed the provisions of Appendix "G" for the purpose of affording B&M the protection it requires pending B&M's inclusion in a major system. B&M accepts those provisions as satisfactory and its co-petitioners E-L and D&H took no exception to them after they were issued by the Commission. The court below stated:[7]

> "We would not feel warranted in overruling the Commission's informed judgment, concurred in in-

[6] N&W (B&O) Jurisdictional Statement, No. 778, p. 11.

[7] Id. at App. B, p. B-68.

itially by all three of the affected railroads and still accepted by B&M, that proper Appendix G provisions take sufficient care of them while they work out their future . . . ."

The revised Appendix "G" conditions of June 9, 1967, include strengthened traffic protection conditions and reimposed indemnification provisions. They are intended to "obviate impairment or serious weakening of E-L, D&H or B&M or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections." [8] The Commission's order makes the protective conditions available to safeguard B&M during the time necessary for a remand of the N&W inclusion case to the Commission for further hearings and consideration of B&M's claim that the Commission set B&M's terms of inclusion too low in erroneous disregard of the substantial savings which B&M would bring to the N&W system. The Commission specifically reissued Appendix "G" conditions to provide for the circumstance which would exist "if, for any reason," [9] there would be an interim between merger of Penn-Central and inclusion of B&M.

Quoting portions of this Court's earlier opinion, N&W concludes that the mandate of this Court has been violated by authorizing consummation of Penn-Central now. The question was briefed exhaustively and, we submit, correctly decided in the district court.[10] We emphasize only that one overriding consideration in the earlier opinion of this Court was that the delay in implementing a merger which promises great benefits to the public would be at most a short delay,[11] whereas if N&W's self-oriented

[8] 330 I.C.C. 333 (1967), citing 327 I.C.C. 532 (1966).

[9] 330 I.C.C. 329.

[10] N&W Jurisdictional Statement, No. 779, App. B, p. B-63 et seq.

[11] 386 U.S. 372 at 392.

interpretation is correct, the delay may be a lengthy one indeed.

N&W's second attempt to show the existence of a "substantial" question in the Penn-Central case is based upon a misreading of the reissued Appendix "G" which the Commission very carefully revised following hearings and the submission of briefs and reply briefs by the parties.[12]

N&W would read the Commission's revised Appendix "G" and its accompanying report to mean that its protection is to be available to the three smaller lines only during whatever short period of time might elapse between consummation of Penn-Central and the fully completed inclusion of the three petitioners in N&W. On the other hand, claims N&W,[13] the district court saw in Appendix "G" the means of protecting the petitioners while they work out their future—in N&W or otherwise. Thus, argues N&W, the district court decided the case on a basis which differed from that relied upon by the Commission. What N&W's argument overlooks is the plain wording of paragraph 1(b) of the revised Appendix "G."[14] It specifically contemplated that the "protected period" for the three petitioners would last from the date of the consummation of Penn and Central until inclusion of the protected carrier in a system embracing N&W or a successor thereto or the system to be operated by the merged company (Penn-Central). The wording of the revised Appendix "G" and the report's discussion[15] of the definition of protected period leave no doubt that with respect to each protected line, this protection was intended

[12] 330 I.C.C. 332.

[13] N&W (B&O) Jurisdictional Statement, No. 778, p. 15, citing App. B thereto, p. B-68.

[14] 330 I.C.C. 362.

[15] Id. at 335.

by the Commission to last at least until its inclusion in a major system embracing N&W, or a successor thereto, or Penn-Central.

N&W's third argument for the purpose of showing that "substantial" questions exist is that the Commission failed to pass upon N&W's claim that Appendix "G" conditions of "indefinite" duration will substantially injure the unprotected eastern railroads. N&W reviews the testimony it proffered to the effect that a revenue pool would be created, and that a community of financial interest between Penn-Central and the protected carriers would induce all of those lines to route traffic to one another. N&W admits that the Commission considered its contentions and rejected them, but apparently bases its claim that the Commission has never passed on its argument on its assertion that the Commission rejection was firstly "on the express ground that harm to the public and to the other eastern railroads could not result because Appendix G would be in effect only for a 'relatively short' period of time (330 I.C.C. at 350) . . . ." [16] N&W's claim of express reliance by the Commission is at best dubious since, at the page referred to, the Commission was discussing the adequacy of a 50 percent indemnification ratio and was not dealing with the rejected N&W contentions. N&W argues that the Commission's second basis for rejecting N&W's contentions was that the protected carriers expect to become affiliates of N&W and therefore would not divert traffic from N&W. N&W states flatly that B&M does not regard itself as a prospective affiliate of N&W.[17] That N&W has misconstrued B&M's aims is made clear by the affidavit of Richard J. Mulhern attached hereto as Apendix A. Having lost both of its supports, N&W's third argument falls.

---

[16] N&W (B&O) Jurisdictional Statement, No. 778, p. 21. See 330 I.C.C. 353-59, where N&W's contentions are discussed.

[17] Ibid., and N&W Jurisdictional Statement, No. 779, p. 21.

N&W's fourth attempt to show a "substantial" question in the *Penn Central* case builds upon the third. Now terming as a "permanent" Appendix "G" what it previously had called an "indefinite" Appendix "G," N&W goes on to claim that the Commission failed to determine whether the Penn-Central merger would be in the public interest, given a permanent Appendix "G." Certainly no person can say how many days or months it will take to resolve the eastern rail merger problems and to include each of the protected carriers in a system. However, the Appendix "G" provisions are in essence temporary and the Commission, which manifestly intends to keep them temporary, has in its supplemental order of June 9, 1967, retained jurisdiction of these proceedings "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate . . . ." [18]

N&W INCLUSION CASE

N&W's first argument to show the existence of a substantial question in the *N&W Inclusion* case is that the Commission has not found that any public interest will be served by directing N&W to acquire the stock of deficit railroads. N&W's argument begs the question whether the Commission's finding was proper when it terms the petitioners "deficit" railroads; the Commission specifically found that when traffic gains, control savings and other specific adjustments are considered, none of the petitioners will be deficit railroads. As a carrier which is already realizing $12 million per year in savings [19] from its 1964 consolidation with Nickel Plate et al, N&W must realize it proves nothing by rehearsing figures as to past deficits.

N&W's second argument is that there are no findings to support inclusion of E-L alone or E-L and D&H with-

[18] The supplemental order follows 330 I.C.C. 369. See also id. at 359.

[19] Transcript of final oral argument before Commission, F.D. No. 21510, April 13, 1967, p. 3893.

out B&M. N&W's jurisdictional statements in both of its appeals here frequently state that the rejection of Commission terms by D&H is a real possibility and their rejection by B&M a virtual certainty. While it cannot be said that N&W has suggested that it would welcome a requirement that it take E-L and D&H without accepting B&M as well, it is true that N&W's principal policy spokesman, Senior Vice-President John P. Fishwick, equivocated when the presiding officer at the *Inclusion* case hearings asked him whether N&W would actually want B&M if N&W were required by the Commission to accept E-L and D&H.[20] Further evidence of N&W's disinterest in B&M, and to a degree in D&H, was exhibited by N&W's counsel at the final oral argument in F.D. No. 21510 before the full Commission on April 13, 1967, where the following colloquy took place.[21]

> "Chairman Tucker. How much is that worth to N. & W.? The fact that B. & M. might not get into Penn-Central, how much is that worth to N. & W.?
>
> "Mr. Trienens: N. & W. would just as soon see Boston & Maine, and if Boston & Maine goes, let D. & H. go with them as far as N. & W. is privately concerned."

In sharp contrast, N&W has once again reversed its field and now claims that inclusion of B&M and D&H is of the utmost importance to the success of an N&W system which includes E-L. If the Commission erred, as N&W claims, in not making B&M and D&H inclusion mandatory,[22] then N&W led it into that error and cannot be heard to complain now.

---

[20] Mr. Fishwick responded: "I don't really know. We haven't considered that possibility. It would depend, I think, on the price. . . ." Transcript, hearings, F.D. No. 21510, May 24, 1966, p. 1520.

[21] Transcript, pp. 3897-98; See also pp. 3918-19.

[22] N&W (B&O) Jurisdictional Statement, No. 778, p. 14.

N&W's final effort to show a substantial question is based upon its claim that the district court provided "a most extreme example of a reviewing court propelling itself into the administrative domain . . . ." N&W Jurisdictional Statement, No. 779, p. 26. The district court opinion itself provides the best answer to that argument.

B&M'S FUTURE

We turn now to a brief discussion of B&M's goals in these related proceedings. It appears important to do so since N&W's arguments in both of these appeals and its hopes for stopping everything until it achieves its proposed merger with C&O, all center about the possibility that N&W will not, in the N&W inclusion proceedings, acquire B&M, a railroad N&W has castigated as having debt greater than the value of its equity and which, N&W says, serves a slowly growing part of the country where railroads are in a "stagnant" condition.[23]

N&W's Jurisdictional Statement in No. 779 is completely in error in asserting that B&M does not regard itself as a prospective "affiliate of N&W," and that B&M is already an "ally of Penn-Central, having realigned itself as a defendant in the Penn-Central litigation."[24] It has been made perfectly clear that B&M does regard itself as a prospective affiliate of N&W. That is the reason B&M is appealing from the Commission's erroneous failure to accord B&M adequate credit for the contributions it would make to an N&W system. B&M's continuing interest in becoming a part of the N&W system on equitable terms is stated unequivocally in the affidavit of its chief executive officer filed with the court below on September 14, 1967. (Appendix A, p. A-3). If

---

[23] N&W Opening Brief, F.D. No. 21510, Sept. 19, 1966, p. 83 et seq; Transcript, hearings, F.D. No. 21510, May 23, 1966, p. 1325.

[24] N&W Jurisdictional Statement, p. 21.

B&M is not successful in getting into the existing N&W system at this time, B&M would be willing to attempt to negotiate terms for its inclusion in the N&W-C&O system, even though B&M realizes that their proposed merger faces serious obstacles and that N&W's chief executive officer has termed the N&W-C&O proposal to B&M a "take it or leave it proposition." Only if both of those possibilities fail will B&M turn to other alternatives to assure a continuation of its essential services. One of those would be to become a part of the Penn-Central system. For its own purposes, N&W has persistently ignored the priority which B&M has assigned to inclusion in an N&W system. N&W's alleged "hard fact . . . that B&M is already an ally of Penn-Central" [25] is not a fact at all.

Turning to N&W's allegation that the stand which B&M has taken in the *Penn-Central* case proves that it is an ally of Penn-Central, N&W is well aware of the reasons why B&M has realigned itself as a defendant therein. B&M came many months ago to the conclusion, set forth in the affidavit of its chief executive officer filed in the proceedings below, (App. A, p. A-3) that:

> "N&W will continue to resist B&M's merger progress at least until such time that it is faced with competition from Penn-Central. Therefore, if the protective traffic and indemnity provisions of Appendix 'G' are judicially upheld, the vital interest of B&M and the public it serves in securing B&M's early inclusion in a merged system is best served by the consummation of a Penn-Central merger without further delay."

So long as N&W is free to enjoy the fruits of its already consummated merger with Nickel Plate and its acquisition of Wabash and several smaller lines without being faced with competition from Penn-Central, N&W will be free also to continue its strategy of thwarting the inclusion efforts of B&M, of refusing to negotiate terms for

[25] Ibid.

B&M inclusion in N&W or in N&W-C&O—and of attempting to secure the strategically located properties of the B&M at a price substantially less than their value.

N&W's hard words to the effect that B&M's purpose is to ruin D&H and severely injure E-L [26] are accompanied by a quote from one of B&M's briefs in the cause below which is lifted out of context from the middle of a paragraph. A point which B&M has frequently made in its briefs in these proceedings is that B&M has a strategic value to any of the three possible major systems because it originates and terminates the vast majority of traffic it handles [27] and therefore has direct contact with shippers and consignees, an advantage which is generally recognized as affording a carrier the opportunity to influence them to use its long haul. N&W's strategy in the instant proceeding is to ignore this aspect of B&M value, and with respect to B&M's third possible alternative home, the Penn-Central system, to attribute any desirability of that inclusion solely to anticompetitive effects. A reading, in context, of the portion of B&M's brief below to which N&W referred demonstrates clearly that B&M was addressing itself to its considerable strategic value as a compelling reason for a remand of the case to the Commission for a reassessment of B&M's worth to the N&W system in view of the Commission's findings as to the savings available through B&M inclusion in N&W.

Finally, we note that N&W faults the Commission [28] for its failure to decide which one of the systems was to be the home of the protected roads, with entrance to other systems foreclosed. In that instance, N&W suggests, the

---

[26] N&W Jurisdictional Statement, No. 779, p. 21, N. 13, quoting from B&M Brief, Sept. 5, 1967, S.D.N.Y., 67 Civ. 2451, pp. 42-43.

[27] B&M Reply to Exceptions, F.D. No. 21510, April 1, 1967, p. 11 et seq.

[28] N&W (B&O) Jurisdictional Statement, No. 778, p. 14.

stockholders of the protected roads would have been obliged "as the only alternative to destruction by Penn-Central" to accept "the equitable terms" set by the Commission.

What N&W suggests is a consolidation of all of the cases in which B&M, D&H, and E-L are involved for the purpose of reaching a single decision as to their future. This suggestion comes with ill grace from the carrier which throttled the consolidation efforts of D&H and B&M in 1962 at a time when the *N&W-Nickel Plate-Wabash* proceeding was awaiting the examiner's report, the *C&O-B&O control* case was awaiting final consideration by the Commission, and the *Penn-Central* case was still in the hearing stage.

Anxious to reap the financial rewards of its then-pending merger, N&W vigorously opposed consolidation. The arguments which N&W's present Senior Vice-President used then to oppose the consolidation sought by the smaller carriers in 1962 are of interest in view of N&W's present and recent urging of consolidated consideration now that it is enjoying the fruits of its Nickel Plate-Wabash consolidation at a level of more than $12 million per year. Some of those arguments are set forth in Appendix B hereto, an excerpt from B&M's reply brief in the Appendix "G" proceedings before the Commission.

CONCLUSION

B&M respectfully submits, therefore, that the questions raised by N&W and its allies are not substantial. Accordingly, the judgment of the district court in the *Penn-Central Merger* proceedings, No. 778, should be affirmed, and the judgment of that court in the *N&W Inclusion* case should be affirmed in part, that is, with respect to the questions raised by N&W in No. 779, but should be reversed and remanded to the Commission for further hear-

ings and consideration on the points raised by B&M in No. 833.

Respectfully submitted,

EDWARD A. MCDERMOTT
JAMES A. BELSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorneys for Boston
and Maine Corporation

Appellee in Nos. 778 and 779

Of Counsel:

HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

November 27, 1967

APPENDIX A

AFFIDAVIT OF RICHARD J. MULHERN
September 13, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

66 Civ. 2860 and Consolidated Actions

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

BOSTON AND MAINE CORPORATION,
Intervenor.

AFFIDAVIT OF RICHARD J. MULHERN

Commonwealth of Massachusetts)
) ss:
County of Suffolk)

RICHARD J. MULHERN, being duly sworn, deposes and says:

I am President and Chief Executive Officer of Boston and Maine Corporation (B&M), having been elected to that position by the Board of Directors of the Corporation in November of 1966. Prior to my assuming that position I served as Vice President—Law and in a number of other capacities with the Legal Department of B&M, having entered that department in 1958.

The purpose of this affidavit is to comply with the request for information set forth at pages 18 and 19 of this Court's Memorandum Order of July 3, 1967. To supplement the information contained in the affidavits already filed by other parties, I will state B&M's position with regard to the following three matters:

1. With respect to the grounds upon which B&M challenges the inclusion order, the position of B&M may be summarized here by incorporation by reference of the Summary of Argument which is set forth at pages 2-4 of the Brief of B&M as an intervening plaintiff in 67 Civ. 2451 which was filed with this Court on September 5, 1967, rather than by the summarizations by other parties in their affidavits.

2. With respect to this Court's suggestion of the "possibility of separate and expedited determination of the validity of the direction for inclusion, as distinguished from the terms," it is B&M's view that inequitable or illegal terms would of themselves vitiate any direction of inclusion, and that therefore the inclusion order must be reviewed as a whole.

3. With respect to the position of B&M as to "whether and why a further injunction is needed," it is as follows:

B&M opposes any further injunction against the consummation of the Penn-Central merger upon the conclusion of these proceedings, if this Court upholds the propriety of the protective traffic and indemnity provisions of Appendix "G". B&M opposes further injunctive relief under these conditions even if B&M should not, as the result of the inclusion case, become a part of the present N&W system.

B&M feels strongly that the public it serves and the B&M itself are adequately protected by the Appendix "G" provisions, as revised, and that no further delay of the Penn-Central merger is required. B&M does not, in

this proceeding, challenge any aspect of the protective traffic and indemnity conditions of Appendix "G". I understand also that D&H and E-L do not here attack those provisions, either on the basis of their inadequacy or on any other grounds.

The present course of these and related proceedings has justified the fears of the four dissenting justices as to what might be done by "ingenious counsel bent on delay". *Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372, 472 (1967). B&M has seen its effort to be included in N&W at what B&M considers a fair evaluation of its worth rebuffed by N&W at every juncture and on every conceivable ground. It is important to note that N&W, in its Brief filed with this Court on August 8, 1967, p. 12, is entirely incorrect in stating that B&M has all but announced abandonment of its effort to obtain inclusion in N&W. To the contrary, this Court correctly summarized B&M's position in the inclusion case at p. 4 of its Memorandum Order of July 3, 1967 in these proceedings where it stated that B&M supported direction of its "inclusion in N&W but challenge[s] the financial terms." As the result, in large measure, of N&W's resistance to B&M inclusion in its system, B&M has frequently suggested the alternative of a Commission denial of B&M's Petition for Inclusion in N&W followed by a B&M effort to secure inclusion in the Penn-Central system pursuant to the terms of Appendix "A" to the Commission's Report and Order in these proceedings of April 6, 1966.

I wish to make it clear that B&M still seeks inclusion in a system embracing the N&W, provided that such inclusion is on fair and equitable terms. Nevertheless, on the basis of its representations, we are convinced that N&W will continue to resist B&M's merger progress at least until such time that it is faced with competition from Penn-Central. Therefore, if the protective traffic and indemnity provisions of Appendix "G" are judicially

upheld, the vital interest of B&M and the public it serves in securing B&M's early inclusion in a merged system is best served by the consummation of a Penn-Central merger without further delay. Further reason for B&M support of prompt consummation of the Penn-Central merger is afforded by the fact discussed in B&M's Brief herein of August 28, 1967 at p. 6, that the realization of that merger is a prerequisite to B&M inclusion in any of the three systems presently being considered by the Interstate Commerce Commission for the Northeastern section of the United States.

With respect to whether the Commission has lawfully directed prompt consummation of the Penn-Central merger in view of all the circumstances, including the Supreme Court's decision of March 27, 1967, we note that circumstances have changed since March of this year: the Commission has issued revised protective traffic and indemnity provisions: one of the three railroads for the sake of which the merger was postponed (B&M) now actively seeks prompt consummation. B&M feels that a reweighing of the same factors which were considered by the Supreme Court last winter and were found, apparently, to be nearly evenly balanced will, when undertaken today, reveal that the balancing of all interests favors prompt consummation. (See this Court's Memorandum Order of July 3, 1967, p. 17, citing language at 386 U.S. 391.)

For the above reasons and because B&M feels that prompt consummation of the Penn-Central merger is in the public interest, B&M actively opposes any further injunction against the consummation of the Penn-Central merger after the conclusion of these proceedings before this Court, provided that the propriety of the protective conditions discussed above is upheld.

/s/

RICHARD J. MULHERN

Subscribed in my presence and sworn to before me by the affiant above-named this 13th day of September, 1967.

/s/ .....
Notary Public

My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served by me by first class mail, postage prepaid, this 14th day of September, 1967, upon all parties of record herein.

/s/ James A. Belson
JAMES A. BELSON

APPENDIX B

EXCERPT FROM REPLY BRIEF OF BOSTON AND MAINE CORPORATION IN APPENDIX "G" PROCEEDINGS

APPENDIX B

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21989

Finance Docket No. 21990

Joint Application of
THE PENNSYLVANIA RAILROAD COMPANY
and
THE NEW YORK CENTRAL RAILROAD COMPANY

REPLY BRIEF OF BOSTON AND MAINE CORPORATION UPON ISSUES I AND II OF THE REOPENED [APPENDIX G] PROCEEDINGS

[The following is an excerpt commencing at page 24 and continuing through page 27 of the above brief which was filed on February 6, 1967]

* * * *

N&W PLAN FOR DELAY

Section III of the N&W Opening Brief[52] is sharply critical of the Commission. Its basic contention is that Penn-Central consummation should not be permitted until

---

[52] N&W Opening Brief, p. 43 et seq.

there is a Commission *finding* that B&M, EL and D&H can be included in a major rail system consistently with the public interest. In the brief's conclusion, N&W goes beyond that request and asks that consummation of Penn-Central be deferred until B&M et al. *are included* in a major system.

Plainly, N&W is asking that consummation of Penn-Central be deferred until final determination of its joint application with C&O for merger in F.D. No. 23832 et al., and until the subsequent inclusion of B&M et al. in the system thus formed. This is demonstrated by N&W claims that B&M inclusion in N&W itself in F.D. No. 21510 is impossible, and that B&M inclusion in Penn-Central will result in a New England rail monopoly.[53]

After outlining its position that the consummation of Penn-Central must be delayed until a final determination upon inclusion for the three protected lines, N&W chides the Commission for its "failure to face up to these questions," before authorizing Penn-Central to consummate.[54]

The present tactic of delaying Penn-Central by insisting upon a solution for B&M, D&H and EL which is contemporaneous with consummation of the Penn-Central merger comes with bad grace from N&W. In 1962, D&H, B&M and others argued in favor of consolidation, at least for purposes of decision, of the N&W-Nickel-Plate proceedings (F.D. No. 21510), the C&O-B&O control proceedings (F.D. No. 21160), and the Penn-Central merger case (F.D. No. 21989). At that time, the N&W proceeding was awaiting an examiner's report, the C&O-B&O control case was awaiting final consideration by the Commission, and the Penn-Central case was still in the hearing stage.

---

[53] Id. at 48.

[54] Id. at 45.

With great vigor N&W opposed consolidation, even for purposes of decision. In a reply signed by John P. Fishwick, currently Senior Vice President of the N&W, to a D&H petition for consolidation, N&W stated:[55]

> "All of these petitions and the present petition of D&H Co. and D&H are attempts to have the Commission consider over-all plans for consolidation of railroads into a limited number of systems. But the Commission has long recognized that it has no authority under the Transportation Act of 1940 to require rail mergers to follow any predetermined plan. [Citing and quoting authority.]
>
> Under Section 5(2) of the Act, therefore, an applicant is entitled to have the Commission consider the proposed transaction on its merits and without regard to any preconceived plans for massive railroad unification.
>
> To consolidate (for decision or otherwise) these proceedings with the Pennsylvania-New York Central merger case and C&O-B&O proceeding would be to deny the applicants herein the right to have their proposals considered separately and on their own merits, as the statute requires."

Mr. Fishwick then added:[56]

> "Moreover, the period between the filing of an application with the Commission for unification authority and the consummation of the transaction is, at best, a difficult one for the involved railroads. During this "waiting period," it is often impossible to make firm decisions regarding assignment of personnel, with the result that undue prolonging of the final decision would seriously impair employee morale. This problem is compounded by the retirement of key officials and personnel, whose positions must be

[55] Reply Due September 20, 1962, pp. 4-5, F.D. No. 21510 et al.

[56] Id. at 6-7.

filled pending final action on proposed unification plans. It is, therefore, imperative from the point of view of employee morale and sound management practice not to postpone ultimate decision in the pending N&W unification proceedings any longer than is absolutely necessary.

Delay in the ultimate disposition of these proceedings would also make it difficult for the involved carriers to formulate sound plans for capital expenditures, especially purchase of new equipment, and for financing. Once the properties have been combined, increased efficiencies will obviate the need for considerable equipment which would otherwise be needed. If the interim period were to be prolonged, however, the involved carriers, in order to maintain their established standards of service, will be required to make sizable expenditures for equipment and other improvements which would not be needed after the unification."

At the oral argument on the proposed consolidation, Mr. Fishwick was even more explicit in his opposition to a delay in the N&W merger until a unified decision of all three of the principal pending merger cases could be accomplished by the Commission. He stated: [57]

"The Commission's sole role is to decide *whether such plans as submitted conform to the statutory standards which are in the public interest, and with such conditions as it might decide the public interest requires be imposed. We are, we think, entitled under the plain meaning of the statute to a prompt decision.* We cannot get such a prompt decision if we are to be held up while every railroad in the East, or New England, or in the entire country for that matter, which subsequently develops or proposes a unification plan of its own, submits it to the Com-

[57] Transcript of Oral Arguments before full Commission, October 24, 1962, p. 108, F.D. No. 21510 etc.

mission and then has it consolidated with ours." (Emphasis added.)

He also stated.[58]

> "As a practical matter, we have this problem: It is impossible to hold together in a state of suspension for a long period of time a financial plan as complex as ours involving as it does six separate railroad properties. As a practical matter, when, say, two railroads get together in a situation such as this the financial arrangements are based largely upon the recent past experience of each. They are used as a guide to what the future might hold, but as time passes the financial position of each of these component parts changes, and if these changes are substantial a deal which looked good in the beginning may prove to be less advantageous to one party than was expected. This is why railroads and their stockholders cannot be committed to any particular deal for long periods of time."

Mr. Fishwick spoke again of N&W's right to a prompt decision, reminding the Commissioners of their duty to make a decision whether to approve their merger or not,[59] and ended his argument with a plea to the Commission that "we think we are entitled to a decision now."[60]

Mr. Fishwick was successful in persuading the Commission not to resolve the problems of all the railroads in the Eastern District simultaneously. N&W, which is presently enjoying the results of its merger transaction with Nickel Plate, now asks this Commission to hold up the merger of the competitive Penn-Central System until the completion of the N&W-C&O-Dereco proceeding which will involve all the remaining railroads in the Eastern

---

[58] Ibid.

[59] Id. at 114.

[60] Id. at 118.

District, and sees fit to criticize the Commission for its "failure to face up to these questions," involving the ultimate fate of B&M, D&H and others. It is hoped that the Commission will recognize that N&W has in effect argued both sides of the same issue in the same case, basing its argument upon what is expedient for it at the time.

There can be no doubt that the real basis for N&W's objections to the protective traffic conditions and the indemnity formula is to be found in its calculated program to hold up the Penn-Central merger while it pursues the N&W-C&O merger and enjoys the fruits of its earlier merger.